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Supreme Court, U.S.
FILED

JUL 30 2010

OFFICE OF THE CLERK

No. 10-165

IN THE
Supreme Court of the United States

BRIAN SCOTT CULVER,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

INTRODUCTION

The Defendant/Petitioner, Brian Scott Culver, was convicted in the United States District Court for the Northern District of Alabama of five (5) counts of violating 18 U.S.C. § 2251(a). Four (4) of the charges were based on a package of Polaroid photographs that were found by police during an initial search of a house in the very early morning of November 13, 2003. One (1) of the charges was based on an 8mm videotape that was found by a police officer in an attic area during a second search of the house on November 14, 2003. The 8mm videotape had never traveled in interstate commerce; only some of its minor component parts, which were useless in creating images until it was assembled in Alabama, had ever traveled in interstate commerce. Following the trial and conviction(s), Mr. Culver was sentenced to seven hundred twenty (720) months imprisonment, which was over *four times* the range of punishment recommended by the sentencing guidelines. The sentence was also based, at least in part, on conduct that Mr. Culver had not been charged with in federal court and conduct that Mr. Culver had previously been acquitted of in state court.

QUESTIONS PRESENTED

I. Does the power vested in Congress by Article I, § 8 of the Constitution extend to allow the prosecution of a defendant for an alleged violation of 18 U.S.C. § 2251(a), when the "materials" alleged to have been used by that particular defendant have never traveled in interstate commerce?

II. Is a defendant deprived of his Fifth Amendment right to Due Process and his Sixth Amendment right to Confrontation when he is not allowed to conduct a noninvasive examination of an alleged minor victim and her mother to obtain photographs of those individuals to compare with alleged pornographic materials, for the purposes of including or excluding these individuals as the individuals depicted in the alleged pornographic materials and challenging the credibility of key witnesses, particularly when the prosecution had already taken photographs to inculpate the defendant?

III. Is a defendant deprived of his Fifth Amendment right to Due Process and his Sixth Amendment right to Confrontation when he is not allowed to introduce evidence of an alleged minor victim's recent prior sexual relations to rebut evidence offered by the

Government that the defendant was responsible for certain items, including condoms, alleged to have been found in the victim's bedroom?

IV. Is a defendant deprived of his Fifth Amendment right to Due Process when he is effectively precluded from testifying, and thus, effectively precluded from presenting any defense at all, by a trial court ruling that would have allowed prior non-final convictions in state court that related to the *exact same* alleged conduct and materials that were at issue in the federal case to be used to impeach the defendant if he testified on his own behalf?

V. Is a defendant deprived of his Fifth Amendment right to Due Process and his Sixth Amendment right to Confrontation when a trial court uses conduct that the defendant has not been charged with in federal court and that the defendant had previously been acquitted of in state court to impose a sentence that is over *four times* what was recommended under the Sentencing Guidelines?

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

The Defendant/Petitioner, Brian Scott Culver ("Mr. Culver"), respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, dated March 2, 2010, is officially reported at 598 F.3d 740, and is reproduced at App. A, 1a-41a.

The Eleventh Circuit's denial of Mr. Culver's Petition for Rehearing and Petition for Rehearing *En Banc* is not officially reported and is reproduced at App. B, 42a-43a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on March 2, 2010. Mr. Culver timely filed a Petition for Rehearing and Petition for Rehearing *En Banc* as allowed by *Federal Rules of Appellate Procedure* Rules 35 and 40. The Petition for Rehearing was denied on May 3, 2010. This Petition is timely under Supreme Court Rule 13.1 because it is filed within ninety (90) days after the denial of rehearing by the Eleventh Circuit. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the U.S. Constitution provides that, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Further, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., Art. I, § 8.

The Fifth Amendment to the U.S. Constitution provides that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V.

The Sixth Amendment to the U.S. Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const., amend. VI.

18 U.S.C. § 2251(a) provides that, "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed." 18 U.S.C. § 2251(a).

STATEMENT OF THE CASE

INTRODUCTION

This action arises from criminal convictions sustained by Mr. Culver in the United States District Court for the Northern District of Alabama. Mr. Culver was charged by a six (6) count Superseding Indictment with employing, using, persuading, inducing, and enticing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, a violation of 18 U.S.C. § 2251(a). Trial Court's Record, Doc. 49, p. 1-5. A jury found Mr. Culver guilty of Counts 1-4 and Count 6 of the Superseding Indictment, and not guilty as to Count 5 of the Superseding Indictment. *Id.*, Docs. 105-110. Mr. Culver was sentenced to a total term of imprisonment of seven hundred twenty (720) months. *Id.*, Doc. 125, p. 1-5.

STATEMENT OF THE FACTS

On the night of November 11, 2003, Brian Scott Culver, ("Mr. Culver"), his wife Sharon Culver ("Ms. Brasuell"),[1] and K.W., Mr. Culver's thirteen (13) year old stepdaughter, were embroiled in a family argument from the previous day concerning recent activities by K.W. Trial Transcript, Doc. 135, p. 603-04. Later that night, K.W. claimed she was awakened by "a shock on the upper part of [her] back" and found Mr. Culver "under the covers in the bed" with her. *Id.*, p. 795-96. K.W. claimed to speak

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[1] Sharon remarried and was referred to by her new name at trial.

to Mr. Culver briefly, then to go downstairs and get water before going to the master bedroom and waking Ms. Brasuell to relate the incident. *Id.*, p. 796-98. A serious argument broke out, with Mr. Culver denying any wrongdoing. K.W. and Ms. Brasuell went to K.W.'s bedroom and claimed to find condoms, "some kind of device," pantyhose, a stethoscope, and a vaginal syringe filled with a pill embedded in a KY Jelly-like substance. *See id.*, p. 799. K.W. denied that she had ever seen any of those items before.[2] *Id.* K.W. and Ms. Brasuell contended Mr. Culver was responsible for these items. *See United States v. Culver,* 589 F.3d 740, 749 n.6. (11th Cir. 2010). K.W. also claimed that she had seen a broken "abstinence card" in her bedroom that afternoon.[3]

K.W. and Ms. Brasuell would also contend that Mr. Culver had given K.W. some type of pill earlier in the afternoon. K.W. testified that Mr. Culver gave her two (2) pills that afternoon, of which she claimed she took one (1) and threw the other in the kitchen garbage can. Trial Transcript, Doc. 135, p. 791-92. Ms. Brasuell later claimed that K.W. was "staggering, off balance, and not herself' at an

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[2] The defense was prohibited at trial from offering recent sexual activity by K.W. to rebut the evidence that Mr. Culver was responsible for these items being in K.W.'s bedroom. *See id.*, p. 816-21. However, the Government was allowed to elicit testimony that Ms. Brasuell had a hysterectomy in 1995, "so that there was no need for [Ms. Brasuell] and Mr. Culver to be using contraceptives." *Id.*, p. 638.

[3] The defense was also prohibited at trial from offering the recent sexual activity by K.W. to rebut the evidence that Mr. Culver was responsible for the broken "abstinence card." *Id.*, p. 816-21.

awards banquet held that evening. *Id.*, p. 628. However, *prior to* the banquet, K.W. never reported to Ms. Brasuell that Mr. Culver had allegedly given K.W. medication, *in spite of the fact* that K.W. alleged Mr. Culver had been told by Ms. Brasuell "never to give [K.W.] medicine again," and K.W. was able to receive several awards, getting up and down and walking among her friends and up on stage several times, and was not observed to drop any awards, stumble, or fall. *Id.*, p. 742-43, 745, 747-50, 792. K.W. also acknowledged that when she had been asked, in earlier proceedings,[4] whether the pill she allegedly took had made her feel any different,

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[4] The "earlier proceedings" were a state court criminal trial that took place in Jefferson County, Alabama. In that case, Mr. Culver was initially charged with four (4) offenses in total; one (1) count of violating Alabama Code § 13A-6-131, prohibiting domestic violence in the second degree, one (1) count of violating Alabama Code § 13A-12-215, prohibiting "furnishing drugs to a minor," and two (2) counts of violating Alabama Code § 13A-12-192, prohibiting possession of obscene materials containing visual depictions of a person under seventeen (17) years of age. The "visual depictions" as issue in the state court case were the *very same* alleged pornographic materials at issue in this case. Mr. Culver was acquitted by the jury of "domestic violence" and "furnishing drugs to a minor," but was found guilty of both counts of possession of obscene materials. On appeal, one (1) of Mr. Culver's convictions was vacated by the Alabama Court of Criminal Appeals. *See Culver v. Alabama*, 22 So. 3d 499 (Ala. Crim. App. 2008). Both the Alabama Supreme Court and this Honorable Court denied Mr. Culver's *Petition for Writ of Certiorari* to review the issue of whether the appropriate relief was to grant Mr. Culver a new trial. *See Culver v. Alabama*, Docket Number 09-209, 130 S.Ct. 462. Despite Mr. Culver's acquittal in state court of the charges of "domestic violence" and "furnishing drugs to a minor," these alleged acts were presented to the federal jury and used to improperly enhance Mr. Culver's sentence, as argued below.

her response was, "not seriously." *Id.*, p. 854-55. Moreover, although K.W. initially claimed that she did not have a headache, she later admitted that she "may have" had a headache, and "may have" told Mr. Culver she had a headache that afternoon. *Id.*, p. 849.

As the family argument continued, Ms. Brasuell eventually called the police and insisted on a top-to-bottom search of the entire house. *See* Trial Transcript, Doc. 135, p. 54, 106-07, 141-42.[5] During the search, officers found seven (7) Polaroid photographs, five (5) of which would form the basis of Counts 2-6 of the Superseding Indictment, and also seized several of the other items allegedly found in K.W.'s bedroom, and various medication bottles and other items throughout the house. On November 13, 2003, pursuant to instructions to look around the house to see if anything looked "askew," Ms. Brasuell presented the police with an 8mm videocamera. *Id.*, p. 256-57, 683-84.[6] However, not until November 14 was the 8mm videotape recovered by police from an attic area that had previously been searched by them. *Id.*, p. 177-79, 259-61.

The Government alleged K.W. was the female in the first portion of the videotape and photographs.[7] For proof, the Government mainly relied on K.W. and her mother's testimony regarding

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[5] Mr. Culver was not present during the search.

[6] It was never established that the 8mm videocamera was used to record the 8mm videotape. (*Id.*, p. 257.)

[7] Initially, the Government contended K.W. appeared on the entire tape, but changed its position in the middle of trial. *See Culver*, 598 F.3d at 751, n.8.

certain characteristics of K.W.'s hands. *See id.*, p. 699, 701, 807-08. The Government also argued that bed sheets that appear in the videotape and photographs were purchased for use at the Cullman County lakehouse. *See Culver,* 589 F.3d at 752. K.W. testified that, at some point in early 2003, she fell asleep on the lakehouse couch and woke up in the master bedroom, with no memory of how she had gotten there and a sensation of numbness in her pubic area. *Id.* Thus, the Government placed the creation of the videotape and photographs between September 2002 and November 2003, and consistently stated it could not be more specific. *See* Trial Court's Record, Doc. 67, p. 1-2.

The Government never alleged that any of the alleged child pornography was produced on November 11, 2003. *See id.,* Doc. 79, p. 162-67.[8] No cameras were set up in K.W.'s bedroom on November 11, 2003; therefore, there was not even an attempt to create any illegal "visual depictions" at that time. *See id.*

BASIS FOR FEDERAL COURT JURISDICTION

The basis for federal court jurisdiction in the federal court of first instance, the United States District Court for the Northern District of Alabama, was an alleged violation of 18 U.S.C. § 2251(a). District courts have original jurisdiction of all offenses against the laws of the United States. *See* 18 U.S.C. § 3231.

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[8] The Eleventh Circuit's decision notes "several months elapsed between the filming of the child pornography and Culver's drugging and shocking of K.W." *See Culver,* 589 F.3d at 749.

REASONS FOR GRANTING THE PETITION

I. The power vested in Congress by Article I, § 8 of the Constitution does not extend to allow the prosecution of a defendant for an alleged violation of 18 U.S.C. § 2251(a), when the "materials" alleged to have been used by that particular defendant have never traveled in interstate commerce.

Mr. Culver should not have been subjected to federal jurisdiction in this case based on the 8mm videotape at issue. Extending federal jurisdiction to Mr. Culver based on the 8mm videotape is inappropriate because, if Mr. Culver is subject to federal jurisdiction under the circumstances presented in this case, it would extend the interstate commerce power "'so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is local and what is national and create a completely centralized government.'" *See United States v. Maxwell ("Maxwell I")*, 386 F.3d 1042 (11th Cir. 2004), *overruled by Maxwell II*, 446 F.3d 1210 (11th Cir. 2006)).[9]

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[9] Mr. Culver acknowledges that *Maxwell I* has been overruled by *Maxwell II*, which relied on this Court's analysis of the scope Congress' Commerce Clause powers set forth in *Gonzales v. Raich*, 545 U.S. 1 (2005). However, it will be necessary to discuss the constitutional principles articulated in *Maxwell I*, and for the sake of brevity and clarity in citation, this Petition will not state each time that *Maxwell I* has been overruled.

In this case, the 8mm videotape that was the basis of Count 1 of the Superseding Indictment never traveled in interstate commerce; only some of its minor component parts, which were useless in creating images until it was assembled in Alabama, had ever traveled in interstate commerce. *See* Trial Transcript, Doc. 135, p. 333-35. Thus, Mr. Culver's case presents a situation where the jurisdictional element relied upon, although relating to interstate commerce on its face, results in an even more tenuous link to interstate commerce than was involved in *Maxwell,* and, indeed, as to Mr. Culver, the jurisdictional element is not at all meaningful, and amounts to nothing more than a "pretextual incantation[ ] evoking the phantasm of commerce." *See Maxwell II,* 446 F.3d at 1218.

However, in considering whether Mr. Culver was subject to federal jurisdiction under these circumstances, the Eleventh Circuit, relying on *Maxwell II,* which in turn relied on *Raich,* did little more than recite its holding in *Maxwell II* that "it is within Congress's authority to regulate *all* intrastate possession of child pornography, not just that which has traveled in interstate commerce or has been produced using materials that have traveled in interstate commerce." *See United States v. Culver,* 598 F.3d at 746-47 (emphasis in original). Ultimately, the Eleventh Circuit held that "Culver's argument that § 2251(a) is unconstitutional as applied to his conduct is foreclosed by our conclusion in *Maxwell II* that Congress has broad authority to regulate both intrastate and interstate child pornography." *Id.*

However, the Eleventh Circuit's blanket application of *Raich* and *Maxwell II* overlooks significant constitutional principles that indicate that federal jurisdiction was inappropriate in Mr. Culver's case. In *Raich,* Justice SCALIA, in a well-reasoned and nuanced concurring opinion, framed the applicable Commerce Clause analysis. *See* 545 U.S. at 33-42. According to Justice SCALIA, Congress' power to regulate "activities that 'substantially affect' interstate commerce" comes from two (2) sources. First, "'where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'" *Id.* (citing *United States v. Lopez,* 514 U.S. 549, 560 (1995)). Second, although Congress may not regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences, Congress may regulate conduct as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* Although the power "to make . . . regulation effective" commonly overlaps with the authority to regulate economic activity that substantially affects interstate commerce, the two principles are distinct. *Id.*

Ultimately, when the validity of Congressional regulation of conduct rests on the principle that the conduct "substantially affects" interstate commerce, the limiting principles articulated in *Lopez* apply. As Justice SCALIA wrote:

In *Lopez* and *Morrison,* the Court-conscious of the potential of the "substantially affects" test to " 'obliterate the distinction between what is national and what is local,' " *Lopez, supra,* at 566-567, 115 S.Ct. 1624 (quoting *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 554, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)); see also *Morrison, supra,* at 615-616, 120 S.Ct. 1740- rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. *Lopez, supra,* at 564-566, 115 S.Ct. 1624; *Morrison, supra,* at 617-618, 120 S.Ct. 1740. "[I]f we were to accept [such] arguments," the Court reasoned in *Lopez,* "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S., at 564, 115 S.Ct. 1624; see also *Morrison, supra,* at 615-616, 120 S.Ct. 1740. Thus, although Congress's authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to "pile inference upon inference," *Lopez,*

> *supra,* at 567, 115 S.Ct. 1624, in order to establish that noneconomic activity has a substantial effect on interstate commerce.

Raich, 545 U.S. at 33-42.

Further, when the validity of Congressional regulation of conduct as part of a broader statutory scheme rests on Congress' "Necessary and Proper Clause authority," other limitations to Congress' power apply. As Justice SCALIA wrote:

> And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch v. Maryland,* even when the end is constitutional and legitimate, the means must be "appropriate" and "plainly adapted" to that end. *Id.,* at 421. Moreover, they may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." *Ibid.* These phrases are not merely hortatory. For example, cases such as *Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), and *New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), affirm that a law is not " ' *proper* for carrying into Execution the Commerce Clause'

> ""[w]hen [it] violates [a constitutional] principle of state sovereignty." *Printz, supra,* at 923-924, 117 S.Ct. 2365; see also *New York, supra,* at 166, 112 S.Ct. 2408.

Raich, 545 U.S. at 33-42.

Justice SCALIA ultimately found the application of these principles to be "straightforward" in *Raich* because "Congress' authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce" and marijuana is a "fungible commodity" that would be difficult to divide out from the more general marijuana market. *Raich,* 545 U.S. at 33-42.

However, the application of these principles to Mr. Culver's case is much less "straightforward." Here, Mr. Culver's activity was noneconomic, and, if Mr. Culver is subject to federal jurisdiction based on the 8mm videotape, then *every defendant* is subject to federal jurisdiction. Ultimately, subjecting Mr. Culver to federal jurisdiction in this case effectively "obliterates the distinction between what is national and what is local." Further, when the issue is framed, as it was by Justice SCALIA in *Raich,* as whether § 2251(a) is an "appropriate means of achieving the legitimate end of eradicating" child pornography from "interstate commerce," then the application of § 2251(a) cannot be upheld as to Mr. Culver. Quite simply, imposing criminal liability on

a defendant when the necessary jurisdictional element rests on a "component part" of a videotape that had never itself traveled in interstate commerce, particularly when the defendant could *not* have used that component part to create the alleged child pornography at issue until the videotape was assembled, cannot be an appropriate means of carrying into effect Congress' statutory scheme, because the link between the conduct and interstate commerce is so attenuated as to be almost entirely absent.

To adopt the Government's view in this case, this Honorable Court would have to "pile inference upon inference" and find that Congress' Commerce Clause powers extended to confer federal jurisdiction if *any* material used in the production of alleged child pornography had traveled in interstate commerce, even if it was, at the time of its travel, in a form that could not be used by a defendant.[10]

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[10] Even if this Honorable Court finds that 18 U.S.C. § 2251(a) is constitutional as applied to Mr. Culver, this Honorable Court should still find that the trial court lacked jurisdiction over Count 1 of the Superseding Indictment. The jurisdictional element of 18 U.S.C. § 2251(a) upon which the Government relied in this case requires that illegal "visual depictions" of a minor be "produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means." *See* 18 U.S.C. § 2251(a). While "materials" is not defined, "visual depiction" is defined to include "undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image." 18 U.S.C. § 2256(5). The only "materials" that Mr. Culver personally used to create the "visual depiction" contained on the 8mm videotape in this case was the 8mm videotape itself. However, the 8mm videotape itself had *not* traveled in interstate commerce. Only some of its minor

Essentially, this renders the jurisdictional element of § 2251(a) meaningless, because in "today's world," it is virtually impossible "to develop a picture without utilizing a material, somewhere down the line, that originated beyond the borders of the state in which the picture was taken." *See Maxwell II,* 446 F.3d at 1218 n.8.

Ultimately, "the scope of the interstate commerce power '"must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."' *Maxwell I,* 386 F.3d at 1063 (citing *United States v. Lopez,* 514 U.S. 549, 557 (1995) ((quoting *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937))). Under these essential principles of federalism, the power vested in Congress by Article I, § 8 of the Constitution does not extend to allow the prosecution of a defendant for an alleged violation of 18 U.S.C. § 2251(a), when the "materials" alleged to have been used by that

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component parts, which were *not usable by Mr. Culver* until the 8mm videotape was assembled in Alabama, had ever traveled in interstate commerce. *See* Trial Transcript, Doc. 135, p. 333-35. The plain language of the statute contemplates that the "materials" at issue must have been directly used by the defendant. Thus, the trial court lacked jurisdiction over Count 1 of the Superseding Indictment, because the "materials" *directly* used by Mr. Culver had *not* traveled in interstate commerce, and were not capable of conversion into a visual image. *See id.*

particular defendant have never traveled in interstate commerce.

The applicable Commerce Clause principles in this case indicate that a defendant may not be subjected to criminal liability under the circumstances presented here, and Mr. Culver's conviction and sentence related to the 8mm videotape should be vacated and set aside.

II. A defendant is deprived of his Sixth Amendment right to Confrontation and his Fourteenth Amendment right to due process when he is not allowed to conduct a noninvasive examination of an alleged minor victim and her mother to obtain photographs of those individuals to compare with alleged pornographic materials, for the purposes of including or excluding these individuals as the individuals depicted in the alleged pornographic materials and challenging the credibility of key witnesses, particularly when the prosecution had already taken photographs to inculpate the defendant.

Mr. Culver's Fifth Amendment right to Due Process and his Sixth Amendment right to Confrontation were denied when he was not allowed to conduct a noninvasive physical examination of the alleged minor victim and her mother to obtain photographic evidence to rebut the Government's contention that K.W. was depicted on the Polaroid photographs and 8mm videotape.

Generally, when a defendant seeks a medical or psychological examination of an alleged minor victim, and this request is opposed, he must show that "denial of access would likely result in an absence of 'fundamental fairness essential to the very concept of justice.'" *United States v. Rouse,* 111 F.3d 561, 567 (8th Cir. 1997). In making a determination of whether to order additional testing, the court must balance the defendant's right to a fair trial against the welfare of the child. *Id.* The balance of these competing interests is of such importance that while the Eighth Circuit has held that defense testing of a minor child cannot be compelled, it also held that if the trial court cannot devise any way other than additional testing to provide the defendant with a fair trial, the case "may have to be dismissed." *Id.* at 568 n.4.

In Mr. Culver's case, the defense sought, not an invasive physical examination *per se,* but the opportunity to take "additional photographs" of the alleged minor victim and/or her mother, so that those photographs could be used at trial to compare to the Polaroid photographs and stills from the 8mm videotape alleged to depict the minor victim. *See* Trial Court's Record, Docs. 12, 79. The State of Alabama, in a previous prosecution, had already, almost one (1) year after the alleged incidents of November 12, 2003, taken photographs of the alleged minor victim and her mother for the same purpose, and these photographs were available to and used by the Government; however, these photographs did not

adequately depict the areas the defense needed.[11] *Id.* In recommending that the defense request for additional photographs be denied, the magistrate judge specifically noted "the clarity of the original photography could be better." *See* Trial Court's Record, Doc. 71, p. 16.

Because Mr. Culver was denied "additional photographs" in this case, he was denied his right to properly present his defense and was denied "fundamental fairness essential to the very concept of justice." *See Rouse,* 111 F.3d at 567. The only way for Mr. Culver to receive a fair trial was to have access to the sought-after additional photographs. The additional photographs of K.W. and her mother were absolutely necessary to the defense. Excluding K.W. as the female subject in the 8mm videotape and Polaroid photographs would, of necessity, have tended to establish Mr. Culver's innocence, as the *only* evidence of the age of the female subject was the Government's attempt to identify her as K.W. Of course, one way of excluding K.W. as the female subject would be proving that the female subject was, in fact, Ms. Brasuell. Evidence that the female subject was Ms. Brasuell was even more exculpatory, vital, and necessary to the defense because the sheets or bedding alleged to be depicted in the background of the alleged pornographic materials were sheets or bedding that were present on the bed shared by Mr. Culver and Ms. Brasuell at the lakehouse, *see* Trial Transcript, Doc. 135, p. 677-78,

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[11] The needed "examination" to procure the defense photographs would have been less lengthy and less invasive than that already conducted by the State of Alabama. *See* Trial Court's Record, Doc. 12, p. 3.

and because of the presence of an "applicator syringe" in the 8mm videotape similar to one seized from the Hoover residence on November 12, 2003, which contained the DNA profile of Ms. Brasuell, *see id.*, p. 571-73.

Initially, the Government represented and contended to the trial court that there was *one and only one female* depicted on the 8mm videotape. *See* Doc. 79, p. 103. Thus, by showing that Ms. Brausell was depicted in any portion of the videotape, the defense could have shown Mr. Culver's innocence. However, in the middle of trial, and with no prior warning to the defense, the Government suddenly asserted that K.W. could not prove that she was the female in what was referred to as the "second portion" of the videotape. *See* Trial Transcript, Doc. 135, p. 194-95, 198-218. This irreparably prejudiced the defense, because Mr. Culver was denied the opportunity that he had sought all along; to confront the evidence offered against him by seeking to prove who was depicted on the videotape and that it was not K.W. *See id.*, p. 204-05. This sudden strategy change by the Government, which was allowed by the trial court, also made it impossible for Mr. Culver to pursue the trial strategy he had selected based on the Government's representations, which was to prove that K.W. was not depicted on the so-called "second portion" of the videotape, and if there was only one (1) woman on the videotape, then K.W. was not the female depicted on *any* portion of the videotape.

Thus, the denial of additional photographs to Mr. Culver resulted in "an absence of 'fundamental fairness essential to the very concept of justice.'" Further, Mr. Culver was ultimately denied his Sixth Amendment right to Confrontation.

This Honorable Court has previously discussed the scope of a defendant's Sixth Amendment and Fourteenth Amendment rights as they apply to pretrial discovery issues. In *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), it considered whether the Sixth Amendment required Pennsylvania to disclose records kept by its Children and Youth Services department so that the defendant could develop exculpatory evidence and effectively exercise his right of cross examination. In a plurality opinion, the *Ritchie* Court held the right to confrontation is a *trial* right, designed only to "prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id.* According to the plurality, a broader reading of the Confrontation Clause would transform it "into a constitutionally compelled rule of pretrial discovery." *Id.*

However, in his concurring opinion, Justice BLACKMUN wrote separately to express the view that the Sixth Amendment Right of Confrontation had relevance to pretrial discovery issues:

> In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-

> examination of a crucial prosecution witness.

Id. at 61-62 (BLACKMUN, J., concurring).

Justice BLACKMUN'S reasoning hinged on his belief that in a certain cases, "simple questioning will not be able to undermine a witness' credibility and in fact may do actual injury to a defendant's position." *Id.* at 63 (BLACKMUN, J., concurring). Justice BLACKMUN pointed to the specific example of *Davis v. Alaska,* 415 U.S. 308 (1974), where the defense had the juvenile record of a key prosecution witness but was unable to refer to it during cross examination. *Ritchie,* 480 U.S. at 63-64. The defense attorney was permitted to question the witness as to bias, but was not allowed to use the file to attempt to point out the reason for that bias. *Id.*

As the *Davis* Court observed, "on the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination." *See id.* (citing 415 U.S. 308, 318 (1974)). In Justice BLACKMUN'S view, the likely reaction of a jury to such a cross examination would be a "sense that defense counsel was doing nothing more than harassing a blameless witness." *Id.* at 63-64 (BLACKMUN, J., concurring).

Ultimately, Justice BLACKMUN stated, "I do not believe, however, that a State can avoid Confrontation Clause problems simply by deciding to

hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage." *Id.* at 64-65 (Blackmun, J., concurring).

This broader view of the Confrontation Clause was also expressed in a dissenting opinion authored by Justice BRENNAN:

> This Court has made it plain that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination," *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). "[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case," *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). The Court therefore has scrupulously guarded against "restrictions imposed by law or by the trial court on the scope of cross-examination." *Delaware v. Fensterer,* 474 U.S. 15, 18, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (*per curiam*).

Justice BRENNAN went on to note that, "a crucial avenue of cross examination also may be foreclosed by the denial of access to material that would serve as the basis for this examination." *Id.* at 66. Thus, "the creation of a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself." *Ritchie,* 480 U.S. at 71 (BRENNAN, J., dissenting).

Justice BRENNAN ultimately viewed the Confrontation Clause as having "independent significance" in these situations because "the :ability to obtain material information through reliance on a due process claim will not in all cases nullify the damage of the Court's overly restrictive reading of the Confrontation Clause." *Id.* at 71-72 (BRENNAN, J., dissenting).

Ultimately, whether Mr. Culver's claim that he was entitled to additional photographs of K.W. and her mother is analyzed under the Sixth Amendment or a Fifth Amendment due process analysis, Mr. Culver was denied fundamental Constitutional rights when he was denied these additional photographs because the denial of this evidence resulted in an "absence of fundamental fairness essential to the very concept of justice."[12] As the Eighth Circuit recognized in *Rouse,* the most "basic test" for denial of due process requires that,

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[12] This lack of fundamental fairness is highlighted by the fact that K.W. and her mother both voluntarily submitted to a physical examination and to photographs that were more intrusive and graphic than those sought by the defense for the purpose of inculpating Mr. Culver.

while medical or psychological examination of an alleged minor victim cannot be compelled, if the trial court cannot devise any way other than additional testing to provide the defendant with a fair trial, the case may have to be dismissed. *See* 111 F.3d at 567 (citing *United States v. Valenzuela-Bernal,* 458 U.S. 858, 872 (1982) for the basic test for denial of due process).

The Eleventh Circuit has also recently dealt with the issue of the use of photographic evidence to prove identity in cases involving alleged sexual offenses. *See United States v. Sarras,* 575 F.3d 1191 (11th Cir. 2009). In *Sarras,* both the defense and prosecution were permitted to take photographs of the defendant's penis in attempt to prove identity. *Id.* at 1199-1200. At trial, there was considerable controversy over the use of both sets of photographs, with sides claiming the other had manipulated the various penis photographs, and the trial court allowed both sides vigorous cross examination and development of these issues.

Although the Eleventh Circuit's decision in *Sarras* rested on its analysis that the trial court's rulings regarding the photographic evidence were subject to its discretion, *Sarras* has broader due process implications; it stands for the proposition that, when the prosecution develops photographic evidence as to identity in a sexual case, a defendant, in fundamental fairness, should be allowed a full opportunity and wide latitude to develop his own evidence to rebut the prosecution. In *Sarras,* both sides were allowed by the trial court to go to great extremes in developing photographic evidence of

identity, and Mr. Culver respectfully argues that this is what due process requires.

Further, the trial court's denial of additional photographs left Mr. Culver in much the same position as the defendants in *Ritchie* and *Davis;* while he was allowed to cross examine K.W. about the absence of marks on her body, because the available photographs did not adequately depict the areas needed for comparison, *effective* cross examination was "foreclosed by the denial of access to material that would serve as the basis for this examination." *See Ritchie,* 480 U.S. at 70 (BRENNAN, J., dissenting). Moreover, because Mr. Culver lacked these additional photographs, "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination." *See id.,* at 63-64 (BLACKMUN, J., concurring). This increased the likelihood that the jury might have felt that "defense counsel was doing nothing more than harassing a blameless witness." *Id.* at 63-64 (BLACKMUN, J., concurring).

The Fifth Amendment and Sixth Amendment require, at the very least, "fundamental fairness" that was denied in this case.

III. A defendant is deprived of his Fifth Amendment right to Due Process and his Sixth Amendment right to Confrontation when he is not allowed to introduce evidence of an alleged minor victim's recent prior sexual relations to rebut evidence offered by the Government that the defendant was responsible for certain items, including condoms, alleged to have been found in the victim's bedroom.

Generally, under *Federal Rules of Evidence* Rule 412, evidence of "other sexual behavior" by an alleged victim cannot be offered unless the evidence falls within three (3) recognized exceptions. However, in this case, Mr. Culver sought to introduce evidence of the alleged minor victim's recent prior sexual relations to rebut evidence offered by the Government that Mr. Culver was responsible for condoms and a broken "abstinence card" that were found in the alleged minor victim's bedroom. This evidence falls within the third exception to Rule 412, because its exclusion violated Mr. Culver's constitutional rights. *See* Fed. R. Evid. 412(b)(1)(C).

The effect of the trial court's ruling that prohibited Mr. Culver from rebutting this evidence was to deny him "a meaningful opportunity to present a complete defense." *See California v. Trombetta,* 467 U.S. 479, 485 (1984). A defendant's opportunity to present a defense is a "well-established" right with roots in the Fifth, Sixth, and Fourteenth Amendments to the Constitution. *United States v. Frazier,* 387 F.3d 1244, 1271 (11th Cir. 2004) (citing *Crane v. Kentucky* 476 U.S. 683, 690

(1986) ("We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.")) On the occasions when a defendant has been denied the right to challenge an alleged victim's credibility with evidence, it has been on the grounds that the evidence was irrelevant for the offered purpose because it neither contradicted nor impeached any testimony of the victim. *E.g.*, *Jones v. Goodwin*, 982 F.2d 464, 469-70 (11th Cir. 1993) (holding evidence that victim was not a virgin at the time of an alleged rape was properly excluded because record was devoid of any mention of victim's virginity that could be rebutted, and thus "would have neither contradicted nor impeached anything [the victim] said while on the witness stand, or, for that matter, anything presented in the state's case").

However, the evidence that Mr. Culver sought to introduce in this case was *extremely* relevant for its offered purpose. The Government elicited testimony from K.W. that she saw condoms and a broken "abstinence card" in her bedroom on November 11 and 12. Trial Transcript, Doc. 135, p. 791, 799. The Government elicited the same testimony from Ms. Brasuell; that Ms. Brasuell had seen condoms in K.W.'s room on November 12. *Id.*, p. 637. *Immediately thereafter*, the Government had Ms. Brasuell confirm that Ms. Brasuell had a hysterectomy in 1995, "so there was no need for [her] and Mr. Culver to be using contraceptives." *Id.*, p. 637-38. The Government's clear and sole purpose for offering the testimony regarding the condoms and broken "abstinence card," as well as the testimony regarding Ms. Brasuell's hysterectomy, was to get the jury to believe that Mr. Culver was responsible

for the condoms and broken "abstinence card" being in K.W.'s bedroom, and that the *only* purpose for the condoms was for Mr. Culver to commit sexual acts against K.W., as Mr. Culver and Ms. Brasuell did not need or use contraceptives.

The defense argued that when the Government elicited this testimony, it "opened the door" to evidence of K.W.'s recent sexual activity. *Id.*, p. 656-59. Although the trial court expressed concern about the testimony elicited by the Government, and Mr. Culver's need to present a defense, stating, "the witness all but said it a few minutes ago," it ultimately ruled that Mr. Culver could not introduce any evidence of K.W.'s recent sexual activity. *See id.*, p. 657-59. However, introducing evidence of K.W.'s recent sexual activity was the *only* way for Mr. Culver to meaningfully rebut the evidence elicited by the Government. The trial court's ruling precluding him from doing so denied him the opportunity to contradict, impeach, and offer alternative explanations for evidence specifically and intentionally introduced by the Government.[13] Thus, Mr. Culver was deprived of "a

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[13] In holding that the trial court properly excluded evidence of K.W.'s recent sexual history because "the key issue in this case is the identity of the female on the tape and in the photographs," and "whether Culver was the source of the condoms or the broken abstinence card found in K.W.'s bedroom is not relevant to the issue of the identity of the female on the tape," *see United States v. Culver*, 598 F.3d at 749-50, the Eleventh Circuit quite simply missed the importance of this issue. It was legally irreconcilable to conclude in one breath that the issue of who was responsible for the condoms and the broken abstinence card is "not relevant to the issue of the identity of the female on the tape," but in the next breath to

meaningful opportunity to present a complete defense." *See Trombetta,* 467 U.S. at 485. Moreover, Mr. Culver was deprived of his right to confront the evidence. A defendant must be given a "'full and fair opportunity to probe and expose [the] infirmities [in a witness' testimony] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.'" *United States v. Baptista-Rodriguez,* 17 F.3d 1354, 1366 (11th Cir. 1994) (quoting *United States v. Williams,* 837 F.2d 1009, 1015 (11th Cir. 1988)). This right of full cross examination is *particularly critical* when the examinee is a chief government witness, and K.W. and Ms. Brasuell

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conclude that the evidence of K.W.'s recent sexual history that Mr. Culver would have used in rebuttal was "marginally relevant at best." *See id.* If the evidence of the condoms and broken abstinence card was not relevant to "the key issue in this case," then the Government should not have been allowed to admit it into evidence in the first place. The Government's clear and sole purpose for offering the testimony regarding the condoms and broken "abstinence card" in conjunction with testimony regarding Ms. Brasuell's hysterectomy, was to get the jury to believe that Mr. Culver was responsible for the presence of the condoms and broken "abstinence card," and thus intended to commit sexual acts against K.W., as Mr. Culver and Ms. Brasuell did not need or use contraceptives. Thus, this evidence was indeed offered to support the identity of K.W. by suggesting Mr. Culver was trying to repeat previously committed sexual acts against K.W. Further, while the Eleventh Circuit characterized the Government's proof of Mr. Culver's responsibility for the items in K.W.'s bedroom as "strong," this was based *solely* on testimony by K.W. and her mother, and that testimony was given under prior assurance from the trial court that Mr. Culver would not be allowed to inquire into K.W.'s recent sexual history, which was the *only* evidence that would have meaningfully rebutted these assertions.

were both "star witnesses." *See id.* (citing *United States v. Garcia*, 13 F.3d 1464, 1468 (11th Cir. 1994)) (emphasis supplied).

The trial court's exclusion from evidence of K.W.'s recent sexual history violated Mr. Culver's constitutional rights.

> IV. A defendant is deprived of his Fifth Amendment right to Due Process when he is effectively precluded from testifying, and thus, effectively precluded from presenting any defense at all, by a trial court ruling that would have allowed prior non-final convictions in state court that related to the *exact same* alleged conduct and materials that were at issue in the federal case to be used to impeach the defendant if he testified on his own behalf.

Generally, under *Federal Rules of Evidence* Rule 609(a)(1), a defendant's prior felony convictions can be used to impeach his credibility if the trial court "determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." However, Mr. Culver's case presents a fairly unique situation. The issue was not whether any testimony that Mr. Culver might offer on his own behalf could be impeached with some prior and unrelated conviction; rather, the Government sought to use Mr. Culver's convictions in state court for possession of obscene materials that involved the *exact same* alleged evidence and events that were being tried in this case. *See generally* Trial Transcript, Doc. 135, p. 879. Thus, the trial court was faced with the decision of letting

Mr. Culver admit that some other jury had found the materials at issue to be illegal pornography, or letting the jury think there were other child pornography crimes in Mr. Culver's past; it felt "neither of which is a good answer." *Id.* Further, Mr. Culver's state court convictions were pending on appeal at the time of the trial of this case, and while the pendency of an appeal does not render the evidence inadmissible, *see* Fed. R. Evid. 609(e), the non-final nature of the convictions was an important factor that the trial court should have considered in assessing the extreme prejudice to Mr. Culver of the jury learning of these convictions.

Mr. Culver's case ultimately presented a situation that is remarkably similar to that in *United States v. Eason,* 920 F.2d 731 (11th Cir. 1990), where evidence of a non-testifying coconspirator's conviction was held inadmissible due to the extreme prejudice that such testimony might lead the jury to "regard the defendant's guilt as settled and the trial as a mere formality." While *Eason* involved the conviction of a coconspirator for the same offense, and Mr. Culver's case involves his own convictions for what were the *exact same* materials, the same concerns that prompted the *Eason* Court to hold the evidence of the coconspirator's conviction inadmissible are readily applicable to an analysis of Mr. Culver's case; that is, that such evidence could lead the jury to abdicate its duty and bring in "someone else's verdict." *See* 920 F.2d at 734. Additionally, "the prejudice incurred by admission of a conviction may be even greater than that incurred by admission of a guilty plea because of the

persuasiveness of the judgment of another group of unbiased fact-finders." *Id.*

Allowing Mr. Culver's non-final state court convictions to be used in any way for impeachment purposes effectively precluded Mr. Culver from testifying and presenting *any* defense at all because the prejudicial effect of these convictions for the *exact same* materials and alleged events would have been absolutely devastating and irreparable. The possibility was overwhelming that the jury, upon learning that another jury had passed upon Mr. Culver's guilt, would simply "bring in someone else's verdict" and regard the issue of Mr. Culver's guilt as "settled," and the trial as a "mere formality," *see Eason,* 920 F.2d at 734. Thus, the trial court's decision denied Mr. Culver his Fifth Amendment right to Due Process because it impermissibly deprived him of the opportunity to present a defense. *United States v. Frazier,* 387 F.3d 1244, 1271 (11th Cir. 2004) (citing *Crane v. Kentucky* 476 U.S. 683, 690 (1986) ("We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard."))

The trial court's ruling that would have allowed the Government to use Mr. Culver's non-final state court convictions based on the *exact same* alleged pornography forced Mr. Culver to elect not to testify because of the devastating effect of those prior convictions. This violated Mr. Culver's constitutional rights.

V. A defendant is deprived of his Fifth Amendment right to Due Process and his Sixth Amendment right to Confrontation when a trial court uses conduct that the defendant has not been charged with in federal court and that the defendant had previously been acquitted of in state court to impose a sentence that is over *four times* what was recommended under the Sentencing Guidelines.

At the sentencing hearing in this case, Mr. Culver argued that the trial court should not have considered any alleged "drugging" and "stun-gunning" of K.W. in determining what sentence to impose because those facts were not ruled or passed upon by the jury in any way, and thus, their use to enhance Mr. Culver's sentence was improper.

While Mr. Culver certainly acknowledges that this Honorable Court has consistently held that *Booker* and its progeny allow a sentencing court to consider "relevant acquitted conduct when the Sentencing Guidelines are applied as advisory," *e.g., United States v. Duncan,* 400 F.3d 1297, 1304-05 (11th Cir. 2005), Mr. Culver respectfully argues, first, that these cases generally apply when a defendant was tried for multiple offenses in the *same federal trial,* and acquitted of some. Mr. Culver's case presents a much different situation in that any alleged "stun-gunning" or "drugging" of K.W. on November 12 did not form an element of any alleged

offense that was being tried in this case.[14] Mr. Culver had also previously been acquitted of these offenses in a prior state court trial. Therefore, to allow the trial court to use this alleged conduct as the basis for a sentencing enhancement violates the spirit of *Booker,* and the applicable constitutional principles, because the jury did not pass on this alleged conduct *at all.*

Further, in allowing the consideration of *relevant* acquitted conduct, this Honorable Court has held that "consideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *United States v. Watts,* 519 U.S. 148, 155 (1997). Accordingly, when such conduct is considered, the defendant is "punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment." *Id. See also Witte v. United States,* 515 U.S. 389, 403 (1995).

From these cases emerges the principle that, before a sentencing court may consider conduct for which a defendant has been acquitted, the conduct must be relevant; that is, it must relate to the *present* offense for which the defendant is being sentenced. In this case, the alleged "drugging" and

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[14] While the Government consistently asserted that any alleged incidents of "stun-gunning" or "drugging" of K.W. were part of the *res gestae* of the alleged offenses, they were properly treated as "404(b) evidence" of *other* alleged wrongful acts, particularly because they occurred at a different and later time than any alleged videotaping or photographing by Mr. Culver. *See generally* Evidentiary Hearing Transcript, Doc. 79, p. 147-65.

"stun gunning" of K.W. played no part in the offense of which Mr. Culver was actually charged. The alleged use of the stun gun *did not occur* on the occasion when Mr. Culver allegedly manufactured the alleged pornographic materials. *See* Sentencing Transcript, Doc. 136, p. 23-24. Indeed, the only stun gun in the case was purchased well after any alleged production of the alleged pornographic materials. *Id.* Ultimately, Mr. Culver was not proved to have owned, much less used, a stun gun during the *charged offense.* Similarly, no proof existed or was offered to indicate that Mr. Culver had the "knowledge and means," through the use of drugs or otherwise, to render K.W. unconscious at the time of the charged offenses. Thus, it was inappropriate for the trial court to consider this "acquitted conduct" in fashioning its sentence.

To the extent that this Court has interpreted *Booker* and its progeny to allow for "relevant acquitted conduct" to be used in the judicial determination of sentencing, Mr. Culver respectfully argues that these opinions are in error, especially when the acquitted conduct was not even alleged to have occurred prior to the "production" offenses charged in this case. Sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment as well as the Due Process Clause of the Fifth Amendment, and this Honorable Court should take this opportunity to overrule its precedents to the contrary.

Judge Barkett's well-reasoned specially concurring opinion in *United States v. Faust,* 456 F.3d 1342, 1349-53 (11th Cir. 2006), illustrates the unconstitutionality of this practice:

> "The Sixth Amendment right to a jury trial is endangered whenever a judge imposes a sentence that is not based solely on "facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington,* 542 U.S. 296, 301 (2004)
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> . . . .
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> As the Ninth Circuit warned fifteen years ago, it "pervert[s] our system of justice [to] allow[ ] a defendant to suffer punishment for a criminal charge for which he or she was acquitted." *United States v. Brady,* 928 F.2d 844, 851 (9th Cir. 1991).
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> . . .
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> Insisting that its decisions in *Jones, Apprendi,* and *Booker* are not "motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance," [543 U.S.] at 237, the Supreme Court has consistently returned to the bedrock principle that criminal sentences must be "authorized" by "the jury verdict alone." *See* [*United States v. Booker,* 543 U.S. 220, 235 (2005)]; *Blakely,* 542

> U.S. at 305; [*United States v. Ring*, 536 U.S. 584, 604 (2002).]

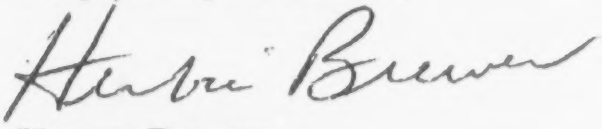
Excerpts from *Faust*, 456 F.3d at 1349-53 (Barkett, J., concurring specially).

In this case, the trial court imposed a sentence based on the alleged use of a stun gun at a time other than the commission of the offense. Thus, the sentence was based on facts that were not reflected in the jury verdict, and of which Mr. Culver had been acquitted by another jury. Ultimately, however, the trial court felt "all this conduct with regard to this victim" could be considered in determining Mr. Culver's sentence. *Id.*, p. 26. Mr. Culver respectfully urges that this method of sentencing violates his constitutional rights, *see Booker*, 543 U.S. at 235; *Blakely*, 542 U.S. at 305; *Ring*, 536 U.S. at 604, and asks this Honorable Court to return to "bedrock principles" and hold that this alleged conduct could not be used to enhance his sentence to over *four times* that recommended by the Sentencing Guidelines.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals
For the Eleventh Circuit

(file stamp)
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

March 2, 2010

JOHN LEY
CLERK

No. 07-14708

District Court Docket No.
07-00009-CR-5-LSC-JEO

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRIAN SCOTT CULVER,

Defendant-Appellant.

(file stamp)

A True Copy – Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit

By:_____
Deputy Clerk
Atlanta Georgia

Appeal from the United States District Court
for the Northern District of Alabama

J U D G M E N T

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

(file stamp)
Issued as Mandate
May 11, 2010
U.S. COURT OF APPEALS
ATLANTA, GA

Entered: March 2, 2010
For the Court: John Ley, Clerk
By: Gilman, Nancy

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

(file stamp)
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

March 2, 2010

JOHN LEY
CLERK

No. 07-14708

D.C. Docket No. 07-00009-CR-5-LSC-JEO

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRIAN SCOTT CULVER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(March 2, 2010)

Before DUBINA, Chief Judge, TJOFLAT, Circuit Judge, and BOWEN,* District Judge.

* Honorable Dudley H. Bowen, Jr., United States District Judge for the Southern District of Georgia, sitting by designation.

DUBINA, Chief Judge:

Brian Scott Culver appeals his convictions and sentences on five counts of production of child pornography under 18 U.S.C. § 2251(a). For the reasons that follow, we affirm.

I. FACTS

On the night of November 11, 2003, K.W., a thirteen year old girl, awoke to a shock on her upper back that made her feel like she was being electrocuted. K.W. turned around, and, to her surprise, saw her stepfather, Brian Scott Culver, in bed with her with a stethoscope around his neck. As K.W. left her room, she noticed that Culver was shoving the stethoscope and some other items under her bed. After venturing to the kitchen in a state of shock to get a glass of water, K.W. woke her mother,

Sharon Brasuell,[1] and told her what had happened. K.W. and Brasuell confronted Culver, and when Culver denied that he had done anything wrong, K.W. and Brasuell looked under K.W.'s bed and found a stethoscope, a vaginal syringe containing K-Y Jelly and a white pill,[2] condoms, and various other items. Culver became angry and told Brasuell that he wanted a divorce. After packing a bag with clothing and some of the items that had been under K.W.'s bed, Culver departed from the family's

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[1] Sharon Brasuell and Brian Scott Culver were married when the events in question occurred, but they are now divorced. Sharon has remarried, and we refer to her by her present name in this opinion.

[2] Brasuell described the pill as white, but K.W. described the pill as brown. Brasuell testified that she dislodged the pill from the syringe and placed it in a Pamprin bottle that contained a number of white pills that were identical to the one in the syringe. The pills in the Pamprin bottle were later identified as zolpidem, commonly known as Ambien. Brasuell also testified that Culver admitted to preparing the syringe because he was bored.

Hoover, Alabama residence and headed for his lake house in Cullman County, Alabama.

Concerned by the evening's events, Brasuell called the Hoover police to report an incident of domestic violence. When the police arrived at the Hoover residence early on the morning of November 12, Brasuell gave them permission to search the entire premises. The police found an Aleve bottle that contained alprazolam, commonly known as Xanax, and diazepam, commonly known as Valium; a Pamprin bottle that contained zolpidem, commonly known as Ambien; a stun gun box; and seven Polaroid photographs. Five of the photographs depict a nude female from the hips to the mid-thighs. The female's hands and vagina are clearly visible in these five photographs. The other two photographs depict a nude male from the waist down.

The police instructed Brasuell, K.W., and K.W.'s brother to continue to be on the lookout for suspicious items at the Hoover residence, and on November 13, Brasuell and K.W.'s brother found a Polaroid camera and a video camera. On November 14, the police returned to the residence and discovered an 8mm videotape. The tape contains two segments: the first segment lasts nearly 19 minutes, and the second lasts approximately one minute.[3] On the first segment of the tape, the female's hands and vagina are clearly visible, and the female's hands do not move at all. The tape depicts a male digitally manipulating the female's vagina and inserting a vaginal syringe into her vagina. At trial, Culver stipulated that his thumb appears on the tape.

II. PROCEDURAL HISTORY

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[3] The government made no attempt to prove that the second segment of the tape is illegal child pornography.

The state of Alabama brought four charges against Culver: two counts of possession of child pornography, one count of distributing drugs to a minor, and one count of domestic violence for allegedly shocking K.W. with a stun gun. The jury in Culver's state trial convicted him of both counts of possession of child pornography, but acquitted him of the charges of drugging and shocking K.W.

In January 2007, a federal grand jury indicted Culver on two counts of producing child pornography in violation of 18 U.S.C. § 2251(a). In March, the grand jury returned a superseding indictment charging Culver with one count of producing child pornography on an 8mm videotape (Count One), and five counts of producing child pornography on Polaroid film (Counts Two through Six).

At trial, the government produced the 8mm videotape and the Polaroid photographs as well as

pictures of K.W. and Sharon Brasuell that display the same areas of the body that are depicted on the tape and in the photographs. The jury also directly observed identifying marks on K.W.'s hands, K.W. and Brasuell testified that K.W. was the subject of the sexually explicit visual depictions on the tape and in the photographs. Based on their evaluation of all of the evidence presented at trial, the jury returned a verdict of guilty on Counts One, Two, Three, Four, and Six and a verdict of not guilty on Count Five.

Culver's presentence report ("PSI") assigned his crimes a base offense level of 27. The base level was enhanced two levels because the victim was between the ages of 12 and 16, two levels because the victim was Culver's stepdaughter, and two levels because the victim was under the influence of drugs and thus vulnerable to sexual exploitation, for a total

offense level of 33. Based on this offense level and a criminal history category of II, Culver's advisory Guidelines sentence range was 151 to 188 months. However, because the statutory minimum on each count was 180 months, see 18 U.S.C. § 2251(e), the lower end of the advisory Guidelines sentence range was automatically adjusted to 180 months. The PSI recommended an upward departure from the Guidelines range for extreme conduct on the basis of Culver's alleged use of a stun gun.

Upon consideration of the presentence report, the testimony of various character witnesses, and the purposes of sentencing stated in 18 U.S.C. § 3553(a), the district court sentenced Culver to the statutory maximum of 360 months on each count with the sentences on Counts One and Two running concurrently; the sentences on Counts Three, Four, and Six running concurrently; and the two sets of

sentences running consecutively, for a total sentence of 720 months imprisonment.

III. DISCUSSION

Culver raises a number of issues in his appeal. He contests the constitutionality of the statute under which he was convicted, a number of evidentiary rulings made by the district court, one of the district court's instructions to the jury, and the sentence imposed by the district court.

A. Jurisdiction

The statutory provision at issue in this case was enacted as part of the Child Pornography Prevention Act of 1996 ("CPPA"), Pub.L. No. 104-208, § 121, 110 Stat. 3009-26 (codified as amended in scattered sections of 18 U.S.C. ch. 110). As relevant to Culver's appeal, the CPPA provides that:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for

> the purpose of producing any visual depiction of such conduct ... shall be punished as provided under subsection (e) ... if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means ....

18 U.S.C. § 2251(a).

Culver contends that the district court did not have jurisdiction over the offense charged in Count One of the superseding indictment because § 2251(a) is unconstitutional as applied to his production of child pornography on an 8mm videotape. In addition, Culver maintains that his conduct did not meet the jurisdictional requirement of § 2251(a). We disagree with both of Culver's jurisdictional arguments.

In United States v. Maxwell, 446 F.3d 1210 (11th Cir.2006) ("Maxwell II"), we examined whether

18 U.S.C. § 2251A, another provision of the CPPA,[4] is constitutional under the Commerce Clause in light of the Supreme Court's decision in Gonzales v. Raich, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). We explained that the task of courts faced with an as-applied Commerce Clause challenge is to determine "whether Congress could rationally conclude that the cumulative effect of the conduct by [the defendant] and his ilk would substantially affect interstate commerce-specifically the interstate commerce Congress is seeking to eliminate." *Maxwell II*, 446 F.3d at 1218. Upon examination of the CPPA, we determined that "there is nothing irrational about Congress's conclusion, supported by its findings, that pornography begets pornography, regardless of its

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[4] The reasoning of *Maxwell II* applies with equal force to § 2251(a). Indeed, we have previously upheld § 2251(a) against an as-applied Commerce Clause challenge. *United States v. Smith*,459 F.3d 1276, 1284 (2006) ("*Smith II*").

origin. Nor is it irrational for Congress to conclude that its inability to regulate the intrastate incidence of child pornography would undermine its broader regulatory scheme designed to eliminate the market in its entirety ...." *Id.* We concluded that "it is within Congress's authority to regulate all intrastate possession of child pornography, not just that which has traveled in interstate commerce or has been produced using materials that have traveled in interstate commerce." *Id.* Culver's argument that § 2251(a) is unconstitutional as applied to his conduct is foreclosed by our conclusion in *Maxwell II* that Congress has broad authority to regulate both intrastate and interstate child pornography.

Congress has chosen to criminalize the production of child pornography "using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any

means." 18 U.S.C. § 2251(a). At trial, the government proved that the magnetic tape in the 8mm videotape at issue was manufactured in Japan and transported to Dothan, Alabama. However, because the magnetic tape at issue is a component of the finished 8mm videotape assembled in Alabama, Culver contends that the magnetic tape does not fall within the scope of the statutory term "materials." Culver's argument is inconsistent with the plain meaning of the statute, and it ignores the fact that he could not have made the visual depictions at issue without the magnetic tape. We conclude that the jurisdictional requirement of § 2251(a) was met in this case, and the district court had jurisdiction over the offense charged in Count One of the superseding indictment.

B. Evidentiary Rulings

Culver challenges a number of the evidentiary rulings made by the district court. After a thorough

review of the record and having the benefit of oral argument, we conclude that all of Culver's evidentiary claims are without merit.

1. Drug and Stun Gun Evidence

Culver first asserts that the district court improperly admitted evidence under Federal Rule of Evidence 404(b) that he drugged and used a stun gun on K.W. on November 11, 2003. "We review the district court's admission of prior crimes or bad acts under [Rule] 404(b) for abuse of discretion." *United States v. Ramirez*, 426 F.3d 1344, 1354 (11th Cir.2005).

The government presented evidence that Culver drugged K.W. with Valium and Xanax and that he attempted to drug K.W. with Ambien. K.W. testified that Culver gave her two blue pills from an Aleve bottle on November 11. K.W. said that she took one of the pills and threw one of them away in the

kitchen garbage can. The police found an Aleve bottle containing 13 Valium tablets and 24 Xanax tablets at the Hoover residence and recovered a Xanax tablet from the kitchen garbage can. K.W. tested positive for Valium, and although the Alabama Department of Forensic Sciences did not attempt to determine the specific quantity of Valium in K.W.'s blood, a departmental representative testified that test data suggested that K.W. had taken a single acute dose of Valium. Sharon Brasuell testified that she found a vaginal syringe containing K-Y Jelly and a white pill under K.W.'s bed and that she discharged the pill from the syringe and placed the pill in a Pamprin bottle containing identical white pills. The Pamprin bottle recovered by the police at the Hoover residence contained six Ambien tablets. In addition, the police found computer printouts

detailing the effects of Valium and Ambien in Culver's Jeep.

The government also presented evidence that Culver shocked K.W. on her upper back with a stun gun. K.W. testified that she awoke to a shocking sensation on her upper back late in the evening on November 11 and that Culver was in her bed when she awoke. When the police arrived on the scene, they took pictures of marks on K.W.'s upper back that appeared to have been made by a stun gun, and they found a stun gun box in the closet of Culver's bedroom.

Rule 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

> knowledge, identity, or absence of mistake or accident ....

Fed.R.Evid. 404(b).

We have explained that Rule 404(b) "is one of inclusion which allows [other act] evidence unless it tends to prove only criminal propensity." *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir.1989). "The list provided by the rule is not exhaustive and the range of relevancy outside the ban is almost infinite." *Id.* (internal quotation marks omitted). Evidence of prior bad acts must meet a three-part test for admissibility:

> (1) the evidence must be relevant to an issue other than defendant's character;
>
> (2) the probative value must not be substantially outweighed by its undue prejudice; [and]
> (3) the government must offer sufficient proof so that the jury could find that defendant committed the act.

United States v. Ellisor, 522 F.3d 1255, 1267 (11th Cir.2008) (quoting *Ramirez*, 426 F.3d at 1354).

The government did not offer the evidence that Culver drugged and shocked K.W. to establish that Culver's character made him more likely to commit the charged offense. To the contrary, the government submitted evidence that Culver had the knowledge and the means to render K.W. unconscious to explain to the jury why K.W. could not remember the filming of the tape and why the female depicted on the tape remained completely motionless. The drug and stun gun evidence was offered for a non-character-related purpose.

"In assessing the probative value of the extrinsic evidence, we evaluate the Government's incremental need for the evidence to prove guilt beyond a reasonable doubt, 'the overall similarity of

the extrinsic and the charged offenses and the closeness or remoteness in time of the charged to the extrinsic offense.' " *Ellisor*, 522 F.3d at 1268 (quoting *United States v. Parr*, 716 F.2d 796, 805 (11th Cir.1983)). Although several months elapsed between the filming of the child pornography and Culver's drugging and shocking of K.W., the government's incremental need for the drug and stun gun evidence to overcome any potential doubt generated by K.W.'s inability to remember the events in question and the overall similarity between the acts depicted on the tape and the events of November 11 render the drug and stun gun evidence highly probative. Furthermore, although the drug and stun gun evidence may have had a prejudicial effect, we cannot say that the evidence's potential for undue prejudice substantially outweighed the evidence's probative value.

With respect to the third prong of the Rule 404(b) admissibility test, Culver contends that the government did not offer proof sufficient for the jury to conclude that he drugged and shocked K.W. because he was acquitted of these acts in state court. Culver's state trial is irrelevant to the issue before us. In our view, the government presented sufficient evidence in the federal trial for the jury to conclude that Culver drugged and shocked K.W, and the district court did not abuse its discretion in admitting this evidence.

2. K.W.'s Prior Sexual History

Federal Rule of Evidence 412(a) provides that, in general, in a "criminal proceeding involving alleged sexual misconduct," "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" is inadmissible. The rule also provides, as a narrow exception to this broad general

principle, that evidence of a victim's prior sexual history is admissible when the exclusion of such evidence "would violate the constitutional rights of the defendant." Fed.R.Evid. 412(b)(1)(C). Culver contends that his case implicates the narrow exception to the general rule and that the district court erred by refusing to allow him to present evidence of K.W.'s sexual history. Culver claims that he should have been allowed to present such evidence to rebut evidence offered by the government that Culver was responsible for condoms and a broken abstinence card found in K.W.'s room. As with other rulings on the admissibility of evidence, we review a district court's application of Rule 412 for abuse of discretion.[5] See *Judd v. Rodman*, 105 F.3d 1339, 1341 (11th Cir.1997).

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[5] At trial, Culver did not raise the argument that he needed to present evidence of K.W.'s sexual history to rebut the government's evidence that the condoms were attributable to

"In determining the admissibility of a victim's other sexual behavior under Rule 412(b)(1)(C), we start with the premise that defendants have a constitutional right under the Fifth and Sixth Amendments to introduce evidence in their defense." *United States v. Pumpkin Seed*, 572 F.3d 552, 559 (8th Cir.2009). However, "the right to present relevant testimony is not without limitation." *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987). "[T]rial judges retain wide latitude ... to impose reasonable limits on [testimony] based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or

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him. "A party not raising an argument below waives his right to raise it on appeal absent plain error." *United States v. Sentovich*, 677 F.2d 834, 837 (11th Cir. 1982). However, because Culver did not waive his argument concerning the broken abstinence card, and our decision is not dependent on the applicable standard of review, we review both of Culver's Rule 412 arguments under the abuse of discretion standard.

only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). Limitations on a defendant's constitutional right to present evidence are permissible unless they are "arbitrary or disproportionate to the purposes they are designed to serve." *Michigan v. Lucas*, 500 U.S. 145, 151, 111 S.Ct. 1743, 1747, 114 L.Ed.2d 205 (1991).

The district court's exclusion of evidence of K.W.'s prior sexual history was not arbitrary or disproportionate to the purposes that Rule 412 was designed to serve. The admission of such evidence would have confused the jury and harassed K.W., and the evidence is marginally relevant at best. The key issue in this case is the identity of the female on the tape and in the photographs. Whether Culver was the source of the condoms or the broken abstinence card found in K.W.'s room is not relevant

to the issue of the identity of the female on the tape.[6] *See United States v. Sarras*, 575 F.3d 1191, 1213 (11th Cir.2009) (explaining that victim's other sexual conduct was irrelevant to issue of identification in child pornography production case under § 2251(a)). Furthermore, the district court allowed Culver to cross-examine K.W. on every issue concerning her prior sexual history that was potentially relevant to the charged conduct. The female depicted on the tape had a shaved pubic region, and on cross-examination, Culver was allowed to ask K.W. when

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[6] Although we conclude that the source of the condoms found under K.W.'s bed is irrelevant to the issue of identification, we note that the government presented strong evidence that Culver was the source of the condoms at issue. Sharon Brasuell testified that she saw the condoms under K.W.'s bed in a shaving kit that she recognized as Culver's, and K.W. testified that she saw condoms in a clear box under the bed. Both Brasuell and K.W. testified that Culver collected a number of items from under K.W.'s bed and put them in his Jeep, and K.W. testified that she removed the clear box from the Jeep and hid it in the bushes. Upon discovering that some of the items had been removed from his Jeep, Culver told Brasuell, "that little bitch has got my stuff, I will kill her." (R. 135 at 668.)

and why she had shaved her pubic region in an effort to prove that K.W. is not the female depicted in the tape. At that time, K.W. revealed that she had shaved her pubic region to please her boyfriend. In addition, the district court allowed Culver to attempt to establish K.W.'s bias by allowing testimony that K.W. had gotten into trouble early in the morning on November 11 and that K.W. was extremely angry with Culver for his role in disciplining her. We agree with the district court that the jury did not need to hear the details of the conduct for which K.W. was disciplined in order for Culver to have a constitutionally sufficient opportunity to impeach K.W. Because the evidence Culver claims he needs to rebut is irrelevant, and the district court allowed Culver to cross-examine K.W. on every issue that had any potential relevance to his defense, we conclude that Culver has not shown that the district

court's application of Rule 412 violated his constitutional rights.

The district court did not abuse its discretion by excluding evidence of K.W.'s prior sexual history, but assuming *arguendo* that the district court erred by excluding evidence of K.W.'s prior sexual history, we conclude that any such error was harmless because the evidence establishing Culver's guilt was overwhelming. See Fed.R.Crim.P. 52(a); *United States v. Harriston*, 329 F.3d 779, 789 (11th Cir.2003) (explaining that error is harmless "where there is overwhelming evidence of guilt.").

3. Request for Additional Photographs

Culver next contends that the district court abused its discretion by denying his request for additional photographs of K.W. and Sharon Brasuell. For Culver's state trial, the prosecution took two sets of photographs of K.W., one on November 12, 2003,

and one on September 9, 2004. The state also took a set of photographs of Brasuell on September 9, 2004. Nonetheless, Culver asserts that he needed additional photographs of K.W. and Brasuell to present his defense because the available photographs do not adequately depict all of the relevant areas of the bodies of K.W. and Brasuell.

The second segment of the 8mm videotape displays the buttocks and the backs of the thighs of a female lying on her left side. The female depicted in this portion of the tape has a series of dark spots on the backs of her thighs. Culver claims that he needed additional photos of the backs of the thighs of K.W. and Brasuell to show that the female depicted in the second segment of the tape is not K.W. But the government did not try to prove that the second

segment of the tape is illegal child pornography.[7] Moreover, some of the photos taken of K.W. for the state trial clearly show that K.W. did not have dark spots on the backs of her thighs. Culver has not made any credible argument that the available photographs of K.W. and Brasuell do not adequately display the areas of the body that were visible on the female in the first segment of the tape.[8] The district court did not abuse its discretion by denying Culver's request for additional pictures.

4. Prior Felony Convictions

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[7] Culver argues that the government unfairly changed its position at trial in a manner that caused irreparable damage to his defense. At a pretrial hearing before a magistrate judge, the government indicated that the tape depicted only one female, but the government conceded at trial that K.W. could not identify herself in the second segment of the tape. The government's change in position merely reflected its candid assessment of what proof it could offer at trial based on the testimony that the government's witness would give.

[8] We note that pictures taken in 2007, approximately four years after the production of the tape, would have had little if any probative value in helping the jury to identify the female on the tape.

Culver argues that the district court erred by ruling that the government could present evidence of Culver's state court felony convictions for possession of child pornography to impeach Culver and any character witnesses that Culver might have presented. Because Culver did not testify, he may not raise a claim that the district court erroneously determined that his prior convictions could be used to impeach any testimony that he might have given. *Luce v. United States*, 469 U.S. 38, 43, 105 S.Ct. 460, 464, 83 L.Ed.2d 443 (1984) ("[T]o raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify."). Similarly, because Culver did not call any character witnesses, we will not address his claim that the district court erroneously determined that his prior convictions could be used to impeach the testimony of any character witnesses that he might have called.

See United States v. LeCroy, 441 F.3d 914, 928 (11th Cir.2006) ("The defendant could have called his witnesses, had them testify, and then objected at the proper time ....").

5. Cumulative Error

Culver contends that all of the alleged evidentiary errors made by the district court had an aggregate prejudicial effect that amounted to the denial of a fair trial. This contention is clearly without merit in light of our conclusion that the district court did not abuse its discretion in making any of the evidentiary rulings challenged by Culver. See *United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir.2004) (concluding that cumulative error doctrine is inapplicable where district court commits no individual errors).

C. Jury Instruction

Culver asserts that the district court erred by failing to give his requested jury instruction on circumstantial evidence. "We review a district court's refusal to give a requested jury instruction for abuse of discretion." *United States v. Klopf*, 423 F.3d 1228, 1241 (11th Cir.2005). We will find an abuse of discretion where " '(1) the requested instruction was substantively correct, (2) the court's charge to the jury did not cover the gist of the instruction, and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense.' " *Id.* (quoting *United States v. Roberts*, 308 F.3d 1147, 1153 (11th Cir.2002)). Culver's requested instruction dealt with the topics of circumstantial evidence and reasonable doubt, and the district court's instructions to the jury adequately covered both topics. Accordingly, we

conclude that the district court did not abuse its discretion in rejecting Culver's requested instruction.

D. Sufficiency of the Evidence

Culver contends that the government did not present evidence sufficient to establish that he violated § 2251(a). We review a sufficiency of the evidence challenge de novo, considering the evidence in the light most favorable to the government and resolving all reasonable inferences and credibility determinations in favor of the jury's verdict. *United States v. Robertson*, 493 F.3d 1322, 1329 (11th Cir.2007).

The key issue in this case is whether the female depicted on the tape and in the photographs was a minor, and Culver does not dispute that K.W. was a minor when the tape and photographs were produced. Sharon Brasuell and K.W. testified that K.W. is the female on the tape and in the

photographs. Brasuell identified K.W. by her slender body, her long slender hands, the style and condition of her fingernail polish, and a distinctive red spot on her right hand. K.W. identified herself by her body shape, her shaved pubic region, the style and condition of her fingernail polish, and a distinctive red spot on her right hand. The jury also viewed pictures of K.W. taken for comparison purposes and directly observed K.W.'s hands in court.

In addition to the direct evidence identifying K.W. as the female on the tape and in the photographs, the government also presented substantial circumstantial evidence indicating that Culver produced illegal visual depictions of K.W. A unique set of blue sheets with snowflakes and polar bears is visible on the tape and in the photographs. Brasuell testified that she purchased these sheets for Culver for use in the master bedroom at his Cullman

County lake house. K.W. testified that, at some point in early 2003, she had fallen asleep on the couch at the Cullman County lake house and woke up in the master bedroom. K.W. could not remember how she had gotten to the master bedroom and testified that she experienced a sensation of numbness in her pubic area when she awoke. As discussed above, the government presented convincing evidence that Culver knew how to render K.W. unconscious.

Viewing all of the evidence presented by the government in the light most favorable to the government and drawing all reasonable inferences in favor of the jury's verdict, we are convinced that the government presented evidence sufficient to support a finding of guilt beyond a reasonable doubt.

E. Sentencing

Culver argues that the sentence imposed by the district court violates the spirit of *United States*

v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), because the district court considered allegations that Culver drugged and shocked K.W.-conduct with which the government did not charge Culver in an indictment, upon which the jury did not pass in its verdict, and of which a state court jury acquitted Culver. Culver contends that the district court's consideration of this acquitted conduct violates the Due Process Clause of the Fifth Amendment and the Double Jeopardy Clause of the Sixth Amendment. Culver's arguments are without merit.

It is well-settled that a sentencing court may consider conduct for which a defendant has been acquitted if the government proves the conduct in question by a preponderance of the evidence. *United States v. Duncan,* 400 F.3d 1297, 1304 (11th Cir.2005); *see also United States v. Barakat,* 130 F.3d

1448, 1452 (11th Cir.1997) (citing *United States v. Watts*, 519 U.S. 148, 153, 117 S.Ct. 633, 636, 136 L.Ed.2d 554 (1997); *United States v. Frazier*, 89 F.3d 1501, 1506 (11th Cir.1996); *United States v. Averi*, 922 F.2d 765, 766 (11th Cir.1991)). *Booker* merely requires that consideration of acquitted conduct does not result in "a sentence that exceeds what is authorized by the jury verdict." *Duncan*, 400 F.3d at 1304. The district court properly considered evidence that Culver drugged and shocked K.W.,[9] and the sentence imposed by the district court did not exceed the sentence authorized by the jury verdict.[10] Thus, we conclude that the sentence imposed by the district court did not violate Culver's constitutional rights.

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[9] Culver does not argue that the government did not meet its burden of proving the acquitted conduct by a preponderance of the evidence.

[10] The jury found Culver guilty of five counts of violating 18 U.S.C. § 2251(a). Each count carries a maximum sentence of 30 years. 18 U.S.C. § 2251(e). Culver's sentence did not exceed the statutory maximum on any single count.

Culver also argues that his sentence is substantively unreasonable. We disagree. We review the reasonableness of a sentence under " 'a deferential abuse-of-discretion standard.' " *United States v. Pugh*, 515 F.3d 1179, 1189 (11th Cir.2008) (quoting *Gall v. United States*, 552 U.S. 38, 40, 128 S.Ct. 586, 591, 169 L.Ed.2d 445 (2007)). To determine whether a sentence is substantively reasonable, we consider whether, under the totality of the circumstances, the sentence achieves the sentencing goals stated in 18 U.S.C. § 3553(a). *Pugh*, 515 F.3d at 1191; *United States v. Talley*, 431 F.3d 784, 788 (11th Cir.2005). Based on our review of the record, we are convinced that the sentence imposed by the district court will achieve the sentencing goals stated in § 3553(a) and that the district court did not abuse its discretion in sentencing Culver.

IV. CONCLUSION

For the foregoing reasons, we affirm Culver's convictions and sentences.

AFFIRMED.

A True Copy – Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit

By:_____
Deputy Clerk
Atlanta Georgia

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

(file stamp)
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

May 3, 2010

JOHN LEY
CLERK

No. 07-14708

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRIAN SCOTT CULVER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: DUBINA, Chief Judge, TJOFLAT, Circuit Judge, and BOWEN, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/Joel F. Dubina
CHIEF JUDGE